Supreme Court, U.S.
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No._____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Emilio Figueroa, dba The Export Group,
Petitioner,

v.

The Mexican Coffee Institute, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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48pp

QUESTIONS PRESENTED FOR REVIEW

The Export Group, a small business in California owned and operated by Emilio Figueroa, sued the Mexican Coffee Institute or Instituto Mexicano del Cafe (INMECAFE) for business torts under the Foreign Sovereign Immunities Act (FSIA). After INMECAFE flouted personal service, The Export Group obtained a default judgment from the district court, affirmatively demonstrating INMECAFE's liability in accordance with the FSIA. Two questions are presented.

1.

Whether the reasons encompassed by Fed. R. Civ. Proc. 60(b)(6) must differ from those enumerated by clauses (b)(1) through (b)(5), such that the Court of Appeals erred in affirming relief from judgment pursuant to clause (b)(6) based on excusable neglect, when INMECAFE did not move for relief under clause (b)(1), and in light of the fact that INMECAFE unsuccessfully asserted grounds for relief pursuant to clauses (b)(3) and (b)(4)?

2.

Whether Fed. R. Civ. Proc. 60(b)(6) requires that the "other reason justifying relief from the operation of the judgment" amount to "extraordinary circumstances", so that a willfully defaulting foreign instrumentality's erroneous belief it was immune from suit, based upon dictum in a circuit court footnote, fails to justify relief from final judgment?

PARTIES

The names of all parties in the court below appear on the caption.

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In the
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Emilio Figueroa, dba The Export Group,
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The Mexican Coffee Institute, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This litigation has resulted in two Ninth Circuit opinions. In *The Export Group v. Reef Industries*, 54 F.3d 1466 (9th Cir. 1995) (Appendix B at A6-29) the court of appeals held that federal courts did not lack subject matter jurisdiction over respondent INMECAFE. INMECAFE chose not petition for certiorari.

On remand, the district court again set aside the judgment against INMECAFE, this time without identifying a specific basis under Fed. R. Civ. P. 60(b) for vacating the judgment. (Appendix A at A3). This order, bereft of findings of fact and conclusions of law, was neither published nor reported.

The Export Group appealed and the Ninth Circuit affirmed the order pursuant to Rule 60(b)(6) in an unpublished disposition. (Appendix A at A1-5). The Court held that

before *The Export Group v. Reef Industries*, 54 F.3d 1466 (9th Cir. 1995) (Appendix B at A6-29), INMECAFE could reasonably have believed that it was immune from suit under the Foreign Sovereign Immunities Act, and so its refusal to appear could not be characterized as culpable. This disposition has been informally reported. (1998 WL 384888; 1998 U.S. App. LEXIS 13606).

JURISDICTION

The court of appeals entered its judgment on June 22, 1998 (Appendix A at A1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Fed. R. Civ. Proc. 60(b), provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) . . . excusable neglect; ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of the judgment."

STATEMENT OF THE CASE

The Export Group is a sole proprietorship[1] engaged in international trade, specializing in representing North American companies on an exclusive basis in the sale of commercial and

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[1] The Export Group has been registered as a sole proprietorship owned and operated by me since September 1996; former partner Jack Andrews left in 1986, and did not join in the second appeal to the Ninth Circuit.

industrial products to agencies of the Mexican government.

In October 1981, The Export Group reached an agreement with a commercial supplier, Reef Industries ("Reef"), whereby The Export Group would serve as Reef's exclusive representative in bidding on a contract from a Mexican government agency, Almacenes Nacionales De Deposito, S.A. ("ANDSA"), for 400 tarpaulins to cover grain storage bins, 200 grain augers, 800 axial fans, 7600 aeration ducts, and 10 pneumatic conveyors. While The Export Group's bid to sell the Reef tarps was under consideration by ANDSA, a corrupt ANDSA employee named Alicia Martinez divulged the details of The Export Group's bid to Javier Mora, then the international director of INMECAFE, as part of a conspiracy to prepare a competing bid.

Mora, acting as an authorized agent of INMECAFE, submitted a bid to sell Reef equipment to ANDSA under another company's name, NEUERO. As a result, ANDSA awarded the contract to NEUERO, and The Export Group suffered a loss of approximately two million dollars in profits anticipated from its exclusive representation agreement with Reef.

The Export Group filed suit against NEUERO and Reef in Orange County Superior Court on June 24, 1983. Asserting diversity jurisdiction, defendants removed the action to the district court for the Central District of California. On November 19, 1984, the Export Group filed its first amended complaint adding INMECAFE, ANDSA, Martinez, and Mora as defendants and alleging causes of action for interference with prospective business advantage, interference with business and contractual relations, negligent interference with prospective business advantage, inducing breach of contract, and conspiracy.

After INMECAFE, ANDSA, and Martinez failed to respond to personal service, defaults were entered against them on May 22, 1985. On September 5, 1986, the Consul of the United

Mexican States filed a motion on behalf of INMECAFE to set aside the latter's default based on lack of personal service and lack of subject matter jurisdiction, under the Foreign Sovereign Immunities Act (FSIA), over an instrumentality of the Mexican Government. The district court denied the motion on April 21, 1987. After The Export Group settled its claims against defendants Mora, NEUERO, ANDSA and Reef, these defendants were dismissed.

On May 5, 1991, The Export Group applied for default judgments against INMECAFE and Martinez. The Export Group demonstrated INMECAFE's liability pursuant to 28 U.S.C. § 1608(e), which requires an affirmative determination of liability based on satisfactory evidence, and which was intended to grant foreign sovereigns the same level of protection as granted the United States by Fed. R. Civ. P. 55(e) by precluding a finding of liability based on mere absence. The default judgments were entered on July 8, 1991, awarding The Export Group $2,032,795.49 plus costs. INMECAFE chose not to appeal entry of judgment.

On the eve of the one-year jurisdictional deadline, in June 1992, INMECAFE filed a motion to set aside the default judgment on the grounds that the judgment was obtained through fraud, misrepresentation, or misconduct. *See* Fed. R. Civ. P. 60(b)(3). Alternatively, INMECAFE claimed that the judgment was void, *see* Fed. R. Civ. P. 60(b)(4), because it was immune from suit for lack of subject matter jurisdiction under the FSIA as suggested in footnoted dictum in a 1989 Ninth Circuit opinion, *Gregorian v. Izvestia*, 871 F.2d 1515, 1522.n.4 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

The district court granted INMECAFE's motion to set aside the default judgment previously entered as void pursuant to Rule 60(b)(4), on the ground it lacked "subject matter jurisdiction pursuant to the Foreign Sovereign Immunity Act, 28 U.S.C. §

1605(a)(5)(B)." 54 F.3d at 1469 (Appendix B at A9). On its own motion, the district court dismissed the action as to INMECAFE. The Export Group appealed to the Ninth Circuit.

In a published decision, *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466 (9th Cir. 1995) (Appendix B at A6-29), the three-judge panel unanimously reversed the order setting aside the default judgment as void pursuant to 60(b)(4). The circuit court decided that subject matter jurisdiction did exist according to the plain meaning of the statute. 54 F.3d at 1473. (Appendix B at A19).

The Ninth Circuit also held that the footnote upon which INMECAFE and the district court relied was dictum, concluding that "these statements were not necessary to the decision and thus have no binding or precedential impact in the present case." 54 F.3d at 1472. (Appendix B at A16-17). However, the circuit court remanded the case for disposition of the undecided 60(b)(3) argument, effectively giving INMECAFE a second bite at the 60(b) apple. 54 F.3d at 1477.n.12. (Appendix B at A29).

On remand, the district court set aside the default judgment without identifying a specific basis for vacating the judgment, (Appendix A at A3), but presumably pursuant to Rule 60(b)(3). The district court then granted judgment on the pleadings in favor of INMECAFE. (Appendix C at A30). Having waited eleven years to raise the defense, INMECAFE claimed the action was barred by a two-year statute of limitations. The Export Group appealed, and the Ninth Circuit affirmed pursuant to Fed. R. Civ. P. 60(b)(6).

The circuit court held that INMECAFE's erroneous belief that it was immune from suit, based upon the footnoted dictum in the *Gregorian* opinion, excused its refusal to appear. "Before our decision in *The Export Group v. Reef Industries*, INMECAFE could reasonably have believed that it was immune from suit under FSIA." (Appendix A at A3). The disposition cited *Gregorian* for the

proposition that whenever a foreign sovereign defendant's erroneous belief that it is immune from suit leads it to "refuse to appear in an action brought under the FSIA, a court may not characterize this refusal as 'culpable conduct' for purposes of a Rule 60(b) motion to set aside a default judgment." *Gregorian*, 871 F.2d at 1525. (Appendix A at A3).

The circuit court did not explain how INMECAFE could reasonably, though erroneously, have believed that it was immune from suit under the FSIA before *Gregorian*. Default was entered against INMECAFE on May 22, 1985, nearly four years before *Gregorian* was decided on April 12, 1989.

The circuit court failed to address Rule 60(b)(6)'s "extraordinary circumstances" requirement, and did not mention Rule 60(b)(3), the subject of the briefing.[2] Clearly, the need for guidance from this Court with respect to Rule 60(b) is acute.

REASONS FOR GRANTING THE PETITION

This case is a timely and rare opportunity to provide guidance to circuit and district courts regarding the proper application of Rule 60(b), especially as it applies to defaulting foreign sovereigns. Moreover, the decision below is erroneous, and the issues that it addresses are important.

I. *The Decision of the Court of Appeals is Erroneous*

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[2] INMECAFE alleged that my lawyer, Mr. Clyde M. Hettrick misrepresented the record to the district court in his application for the default judgment. I replied that Mr. Hettrick's statements were supported by the record and that the alleged misrepresentations fell outside the scope of Rule 60(b)(3), as INMECAFE did not allege they altered the result of the case or prevented it from presenting its case.

This Court's decisions and the language of the rule dictate precisely how Rule 60(b)(6) is to be interpreted with respect to default judgments: the "other reason justifying relief from the operation of the judgment" must amount to "extraordinary circumstances" in order for a court to grant relief from final judgment.

The Ninth Circuit's approach to default judgments by foreign sovereigns dispenses with the extraordinary circumstances test altogether, in favor of a three part test which considers the culpability of a defendant's conduct, the merits of the defense, and prejudice to the plaintiff. (Appendix A at A3). *See, Gregorian v. Izvestia*, 871 F.2d at 1526 ("Extraordinary circumstances analysis has in fact been supplanted by the three-part test . . . ."); Moore's Federal Practice 3d. § 60.48[3][f] ("One Ninth Circuit opinion takes a much less persuasive approach . . . [and] holds that whenever a foreign sovereign reasonably believes that it is immune and does not appear, any subsequent motion for relief from the judgment under Rule 60(b)(6) is not bound by the "extraordinary circumstances" test at all.") The Ninth Circuit's approach finds no support in this Court's decisions.

The extraordinary circumstances requirement grew out of two cases from this Court, *Klapprott v. United States*, 335 U.S. 601 (1949), and *Ackermann v. United States*, 340 U.S. 193 (1950). Both cases involved denaturalization proceedings, and *Klapprott* involved a default judgment.

The distinction between the cases shows the clear threshold established by this Court's rulings concerning Rule 60(b)(6), a requirement distinct from those of the first five clauses of Rule 60(b), particularly the excusable neglect prong of Fed. R. Civ. P. 60(b)(1). The decisions differed in that *Ackermann* was represented by counsel and chose not to appeal the entry of judgment, while Klapprott was unrepresented, ill, and incarcerated when the

default judgment was entered against him. As this Court stated in *Ackermann:*

> The comparison [between *Ackermann* and *Klapprott*] strikingly points out the difference between choice and no choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable neglect. Neither the circumstances of the petitioner nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60(b)(6).

340 U.S. at 202. Like Ackermann, INMECAFE was represented by counsel (in this case by Shearman & Sterling) and chose not to appeal the entry of the judgment. The fact that INMECAFE is a foreign instrumentality represented by corporate counsel is not so extraordinary as to bring it within *Klapprott* or Rule 60(b)(6).

Recently, this Court reiterated that Rule 60(b)(6) is not to be liberally applied: "To justify relief under subsection (6), a party must show "extraordinary circumstances" suggesting that the party is faultless in the delay." *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 393 (1993)(citing *Ackermann* and *Klapprott*). This Court added that "[i]f a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.*

The finality of judgments entered after an affirmative demonstration of liability is an important foundation of our system of jurisprudence. In this case, The Export Group established INMECAFE's liability pursuant to the FSIA, 28 U.S.C. § 1608(e). The judgment against INMECAFE should not have been overturned unless relief was compelled by unusual and exceptional circumstances.

The circumstances encompassed by Rule 60(b)(6) must be not only extraordinary, they must also differ from those enumerated by clauses (1)-(5). In this case, the Ninth

Circuit granted INMECAFE relief from default for "excusable neglect" pursuant to Rule 60(b)(6), even though INMECAFE did not move for relief pursuant to Rule 60(b)(1).

This Court's doctrine could not be clearer with respect to whether Rule 60(b)(6) and the preceding five clauses are mutually exclusive : "Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment . . . provided that the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 863 & n.11 (1988); *see also Cotto v. United States*, 993 F.2d 274, 277 (1st. Cir. 1993) ("Plaintiffs' attempt to garb their motion in the rainment of clause (6) runs aground on the bedrock principle that clause (6) may not be used as a vehicle for circumventing clauses (1) through (5)."); *United States v. Real Property & Residence*, 920 F.2d 788, 791 (11th Cir. 1991) (holding that Rule 60(b)(6) "applies only to cases that do not fall into any other categories listed under parts (1)-(5) of Rule 60(b)").

In this case, the Ninth Circuit applied a three-part test adopted in *Gregorian* to justify relief under Rule 60(b)(6), a test which is no different than the test usually applied to motions brought under Rule 60(b)(1). *See Information Systems and Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993) (collecting cases utilizing three-part test to determine existence of 'excusable neglect' within the meaning of Rule 60(b)(1)). Professor Moore notes that this approach ignores the "extraordinary circumstances" requirement and adopts the reasoning of "two other Ninth Circuit cases that dealt only with relief under Rule 60(b)(1)." Moore's Federal Practice 3d., § 60.48[3][f].

The plain language of Rule 60(b)(6) limits relief to reasons "other" than those enumerated in the first five clauses. The opinion below disregards the intent of the rule's drafters as

well as nearly all cases interpreting the rule by conflating Rule 60(b)(6) and Rule 60(b)(1), and by abolishing the requirement that the circumstances justifying relief from final judgment be truly extraordinary.

II. *The Court of Appeals' Interpretation of Rule 60(b)(6) Conflicts With the Eleventh Circuit's Requirement of "Extraordinary Circumstances" in the Foreign Sovereign Immunities Act (FSIA) Context, and Conflicts With Established Authority Regarding the Proper Application of Rule 60(b)(6) in Other Contexts*

In *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), the Eleventh Circuit affirmed the district court's order setting aside a FSIA default judgment pursuant to Rule 60(b)(6). The circuit court explicitly mentioned the extraordinary circumstances requirement and noted that "[i]n considering whether it should exercise its equitable discretion and whether extraordinary circumstances were involved, the [district] court properly gave consideration to the Secretary of State's assessment of the foreign policy implications of the default judgment." 794 F.2d at 1496. In this case, there was no intimation that the default judgment against INMECAFE had any foreign policy implications.[3]

As mentioned above, the Ninth Circuit does not employ the extraordinary circumstances test to Rule 60(b)(6) relief in the FSIA context, and the opinion below made no mention of extraordinary circumstances. The conflict with the Eleventh Circuit is apparent in *Gregorian*, where the Ninth Circuit purported to follow *Jackson* but stated that the "district court erred in requiring defendants to demonstrate the existence of 'extraordinary circumstances'

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[3] Moreover, there was no suggestion that INMECAFE failed to enter an appearance by order or direction of the Mexican government.

. . . in order to obtain relief from the default judgment under Rule 60(b)(6)." 871 F.2d at 1526. It is beyond dispute that the test employed by the Ninth Circuit and applied by the court below cannot be reconciled with the approach taken by the Eleventh Circuit. This case presents a rare opportunity to clarify whether Rule 60(b)(6) requires a demonstration of extraordinary circumstances in the FSIA context.

In addition, the Ninth Circuit's approach, by considering grounds for relief encompassed in sections (1) through (5) of Rule 60(b), conflicts with long-held authority regarding the proper application of Rule 60(b)(6). It is nearly universally established that Rule 60(b)(6) should not be applied when the circumstances establish no more than reasons covered by clauses (1)-(5). *See, e.g., Gonzalez v. Walgreens Co.*, 918 F.2d 303, 305 (1st Cir. 1990) ("Rule 60(b)(6) applies only to grounds for relief not covered by the first five subdivisions of Rule 60(b).") (citing *Liljeberg v. Health Services Acquisition Corp., supra*, 486 U.S. at 863). As this Court stated in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. at 393, "[i]f a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable."

In sum, the Ninth Circuit's new rule of law ignores this Court's long-standing precedent and creates a significant conflict in decisional law. The Court should grant certiorari to review these important conflicts.

III. *The Question Presented is Important*

Nowhere in federal case law is there a greater need for national uniformity than in regard to the relationship between federal courts and foreign sovereigns. Clearly, the applicability of Rule 60(b) with respect to default judgments entered against foreign

sovereigns involved in commercial activities should not vary from circuit to circuit.

More specifically, the decision below sends a message to foreign sovereigns: a default judgment can be set aside without a showing of extraordinary circumstances whenever a foreign sovereign mistakenly believes it is immune from suit. Perhaps if INMECAFE had relied upon footnoted dictum stated in an opinion of this Court, its erroneous belief could not be characterized as culpable; the fact remains it relied upon circuit court dicta, which are neither scarce nor precedential.

The circuit court below held that INMECAFE's erroneous belief that it was immune from suit, based upon the footnoted dictum in the *Gregorian* opinion, excused its refusal to appear. "Before our decision in *The Export Group v. Reef Industries*, INMECAFE could reasonably have believed that it was immune from suit under FSIA." (Appendix A at A3). That decision held the footnote upon which INMECAFE relied was dictum, concluding that "these statements were not necessary to the decision and thus have no binding or precedential impact in the present case." 54 F.3d at 1472. (Appendix B at A16-17).

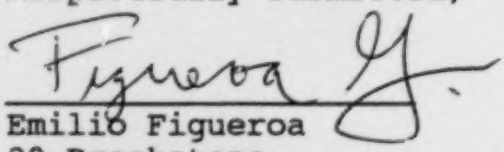
Many foreign sovereigns, such as INMECAFE in this case, are more than competently represented by corporate counsel, and the assumption that they do not understand the intricacies of the FSIA is naive. For these parties, the Ninth Circuit's new test is simply an invitation to refuse to appear without being held responsible for that choice.

In an era of increasing international trade involving sovereign actors, this case presents a timely occasion for this Court to clarify for the international community the level of responsibility expected of foreign sovereigns in the courts of the United States. Therefore, the Court should grant the petition to bring much-needed uniformity and certainty to this area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

F I L E D
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE EXPORT GROUP, Plaintiff, and EMILIO FIGUEROA, Plaintiff-Appellant, v. REEF INDUSTRIES, INC., Defendant, and THE MEXICAN COFFEE INSTITUTE, Defendant-Appellee.	)	No. 96-55811 D.C.No. CV-83 -05338-TJH-Kx **MEMORANDUM** *

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted March 24, 1998**

Before: CHOY, SKOPIL, and FERGUSON, Circuit Judges.

The Export Group specializes in representing North American companies in the sale of commercial and industrial products to agencies of the Mexican government. In 1981, The Export Group lost $ 2 million when one such sale fell through. It sued several defendants in 1983, and one year later added defendant Mexican Coffee Institute (INMECAFE), an instrumentality of the Mexican government. The amended complaint alleged various tort causes of action and asserted subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611. INMECAFE failed to respond and default was entered. Several years later, The Export Group applied for and was granted a default judgment. When INMECAFE moved to set it aside, the district court vacated the default judgment and dismissed the action. The court ruled that, under FSIA, it lacked subject matter jurisdiction over INMECAFE. We reversed. The Export Group v. Reef Indus., 54 F.3d 1466 (9th Cir. 1995). On remand, the district court again vacated the default judgment, then granted judgment on the pleadings in favor of INMECAFE, concluding that the action was barred by a two-year statute of limitation. The Export Group appeals.[1]

I.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

[1] The Export Group has requested assignment of this appeal to the same panel that decided the prior appeal. The former panel, however, deems this case suitable for random assignment. Accordingly, Figueroa's motion for assignment to a specific panel is DENIED.

The district court did not identify a specific basis for vacating the default judgment. We conclude, however, that Federal Rule of Civil Procedure 60(b)(6), providing that a court may relieve a party from a final judgment for "any other reason justifying relief," supports the district court's decision. The rule is remedial and should be applied liberally in favor of a defendant that "seeks timely relief from the judgment and has a meritorious defense." See Gregorian v. Izvestia, 871 F.2d 1515, 1523 (9th Cir. 1989). Thus, a motion to set aside a default judgment should be granted unless (1) the defendant's culpable conduct led to the default; (2) the defendant has no meritorious defense; or (3) the plaintiff would be prejudiced. See id.; Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988).

Here, we cannot say that INMECAFE's conduct in not responding to personal service was culpable. Before our decision in The Export Group v. Reef Industries, INMECAFE could reasonably have believed that it was immune from suit under the FSIA. See Gregorian, 871 F.2d 1515 at 1525 ("Where . . . a foreign sovereign defendant's reasonable belief that it is immune from suit leads it to refuse to appear in an action brought under the FSIA, a court may not characterize this refusal as 'culpable conduct' for purposes of a Rule 60(b) motion to set aside a default judgment."). Further, INMECAFE had a colorable meritorious defense that it lacked vicarious liability for its employee's actions; it was also discernible from the record at the time of The Export Group's complaint that the action was time-barred. Finally, The Export Group contends that it was prejudiced by the setting aside of the default because the Mexican Government dissolved INMECAFE in 1993. The Export Group, however, created its own delay by waiting until

1991 -- five years after the default was entered -- to apply for entry of the default judgment. It cannot now complain of prejudice from INMECAFE's dissolution. Accordingly, because Fed. R. Civ. P. 60(b)(6) supports the district court's decision to set aside the default judgment against INMECAFE, we affirm.

II.

The district court granted INMECAFE's motion for judgment on the pleadings on the ground that The Export Group's action was barred by the statute of limitation. The Export Group contends, however, that (1) INMECAFE waived its statute of limitation defense by waiting eleven years to raise it; (2) the claims did not accrue because of a conspiracy continuing to the present; and (3) the running of the limitation period was tolled by fraudulent concealment. We reject each of these contentions and affirm.

INMECAFE did not waive its statute of limitation defense. On the contrary, it asserted the defense in its answer, timely filed after the default judgment was set aside. Likewise, The Export Group's argument that the conspiracy causes of action have not yet accrued is without merit. Under California law, an action for civil conspiracy accrues when the last overt act occurs, see Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 788-89, 157 Cal. Rptr. 392, 598 P.2d 45 (Cal. 1979); the complaint alleges no overt acts by INMECAFE after November 1981. The complaint indicates that The Export Group knew of INMECAFE's involvement in the incidents that gave rise to the alleged torts; thus, The Export Group cannot claim that the limitation period was tolled by fraudulent concealment. See Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

The Export Group stated in its Ex Parte Application for Leave to Amend that it knew of or suspected INMECAFE's involvement in the actions complained of as early as November 1981. The two-year limitation period ran in November 1983 -- nearly a year before The Export Group named INMECAFE in its amended complaint. See Cal. Civ. Proc. Code § 339(1). The district court was therefore correct in granting INMECAFE's motion for judgment on the pleadings because The Export Group's action was time-barred.

AFFIRMED.

54 F.3d 1466 (9th Cir. 1995)

THE EXPORT GROUP; EMILIO FIGUEROA; JACK ANDREWS, Plaintiffs-Appellants,

v.

REEF INDUSTRIES, INC., Defendant,

and

MEXICAN COFFEE INSTITUTE, Defendant-Appellee.

No. 93-56022

United States Court of Appeals, Ninth Circuit

Submitted February 10, 1995*.

Decided May 22, 1995.

Emilio Figueroa, Irvine, California, and Jack Andrews, Salt Lake City, Utah, pro se for the plaintiffs-appellants.

Charles M. Grant, Shearman & Sterling, Los Angeles, California, for defendant-appellee Mexican Coffee Institute.

Before: James R. Browning, Dorothy W. Nelson, and Michael Daly Hawkins, Circuit Judges.

D.W. NELSON, Circuit Judge:

Plaintiffs-appellants Emilio Figueroa, Jack Andrews, and The Export Group (collectively "Export Group") appeal from the district court's grant of relief from a default judgment

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* The panel unanimously find this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

it had entered against defendant-appellee, the Mexican Coffee Institute or Instituto Mexicano del Cafe ("INMECAFE"), in Export Group's diversity action alleging, inter alia, interference with contract rights. The district court granted INMECAFE's motion to set aside the default judgment on the ground that the judgment was void, Fed. R. Civ. P. 60(b)(4), because the district court concluded that it lacked subject matter jurisdiction over the interference with contract rights claim under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1602 et seq. We have jurisdiction, 28 U.S.C. § 1291, and we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the procedural posture of this case, the parties have not litigated the facts, which are disputed. Nevertheless, in deciding whether the district court appropriately determined that it lacked subject matter jurisdiction, we accept the facts alleged in the complaint as true. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992) (citing *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1513 (9th Cir. 1987)), *cert. denied*, 113 S. Ct. 1812 (1993); *Gregorian v. Izvestia*, 871 F.2d 1515, 1528 (9th Cir.) (stating that "we do not here resolve [a] dispute over the jurisdictional facts"), *cert. denied*, 493 U.S. 891, 107 L. Ed. 2d 188, 110 S. Ct. 237 (1989).

The Export Group is a general partnership[1] engaged in international trade, specializing in representing North American companies on an exclusive basis in the sale of commercial and industrial products to agencies of the Mexican

[1] Following the withdrawal of the Export Group's counsel of record, this court permitted plaintiffs-appellants Emilio Figueroa and Jack Andrews to proceed pro se to represent their individual interests in the partnership.

government. In October 1981, the Export Group reached an agreement with a commercial supplier, Reef Industries ("Reef"), whereby the Export Group would serve as Reef's exclusive representative in bidding on a contract from a Mexican government agency, Almacenes Nacionales De Desposito, S.A. ("ANDSA"), for 400 tarpaulins to cover grain storage bins. While the Export Group's bid to sell the Reef tarps was under consideration by ANDSA, a corrupt ANDSA employee named Alicia Martinez divulged the details of the Export Group's bid to Javier Mora, then the international director of INMECAFE, as part of an alleged conspiracy to prepare a competing bid. Mora, acting as an authorized agent of INMECAFE, submitted a bid to sell Reef tarps to ANDSA under another company's name, NEUERO. As a result, ANDSA awarded the contract to NEUERO, and the Export Group suffered a loss of approximately two million dollars in profits anticipated from its exclusive representation agreement with Reef.

The Export Group filed suit against NEUERO and Reef in Orange County Superior Court on June 24, 1983. Asserting diversity jurisdiction, defendants removed the action to the district court for the Central District of California. On November 19, 1984, the Export Group filed its first amended complaint adding INMECAFE, ANDSA, Martinez, and Mora as defendants and alleging causes of action for interference with prospective business advantage, interference with business and contractual relations, negligent interference with prospective business advantage, inducing breach of contract, and conspiracy. After INMECAFE, ANDSA, and Martinez failed to respond to personal service, defaults were entered against them on May 22, 1985. On September 5, 1986, the Consul of the United Mexican States filed a motion on behalf of INMECAFE to set aside the latter's default based on lack of personal service and lack of subject matter jurisdiction, under the FSIA, over an

instrumentality of the Mexican Government. The district court denied the motion on April 21, 1987.

After the Export Group settled its claims against defendants Mora, NEUERO, ANDSA and Reef, these defendants were dismissed. On May 5, 1991, the Export Group applied for default judgments against INMECAFE and Martinez, and these judgments were entered on July 8, 1991, awarding the Export Group $ 2,032,795.49 plus costs. On June 4, 1992, INMECAFE filed a motion to set aside the default judgment on the grounds that the judgment was obtained through fraud, misrepresentation, or misconduct. See Fed. R. Civ. P. 60(b)(3). Alternatively, INMECAFE claimed that the judgment was void, see Fed. R. Civ. P. 60(b)(4), because the district court lacked subject matter jurisdiction under the FSIA. After oral argument, the district court granted INMECAFE's motion to set aside the default judgment previously entered as void, on the grounds that "this court lacks subject matter jurisdiction pursuant to the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a)(5)(B)." Accordingly, the district court, sua sponte, dismissed the action as to INMECAFE. The Export Group timely appealed from the district court's final judgment.

DISCUSSION

I. *Standard of Review*

Ordinarily, motions for relief from judgment pursuant to Federal Rules of Civil Procedure 60(b) are addressed to the sound discretion of the district court and will not be reversed absent some abuse of discretion. *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993). We review de novo, however, a district court's ruling upon a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one. *Retail*

Clerks Union Joint Pension Trust v. Freedom Food Center, Inc., 938 F.2d 136, 137 (9th Cir. 1991). Furthermore, the existence of subject matter jurisdiction under the FSIA is a question of law subject to de novo review. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1470 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Siderman de Blake*, 965 F.2d at 706.

II. *The Foreign Sovereign Immunity Act*

A. *The Structure and Language of the Act*

The FSIA, codified at 28 U.S.C. § 1330(a),[2] provides the "sole basis" for federal jurisdiction over the Export Group's claims against INMECAFE. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-35 & n. 3, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489, 493, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983). The FSIA creates a statutory presumption that a foreign state and its instrumentalities are immune from suit unless one of the specific exceptions enumerated in sections 1605 through 1607 of the Act applies. 28 U.S.C. § 1604. The Export Group claims that subject matter jurisdiction over their claim of interference with contract rights is conferred by the "commercial activity" exception to foreign sovereign immunity codified at 28

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[2] Section 1330(a) creates in the district courts original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement. 28 U.S.C. § 1330(a). For purposes of this section, a "foreign state" is defined as including "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

U.S.C. § 1605(a)(2). Section 1605(a) provides in relevant part:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States *in any case*-

(2) in which the action is based

[i] upon a commercial activity carried on in the United States by the foreign state; or

[ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or

[iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States * * *

28 U.S.C. § 1605(a)(2) (emphasis added). Elsewhere, the FSIA defines "commercial activity" as follows:

A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The fifth exception to the general grant of sovereign immunity in section 1605 reads:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case - . . .

(5) *not otherwise encompassed in paragraph (2) above,* in which money damages are sought against a foreign state for personal injury or

death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except *this paragraph* shall not apply to - . . .

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a) (emphases added).

In granting INMECAFE's motion to set aside the default judgment, the district court ruled that the exceptions to the waiver of sovereign immunity contained in section 1605(a)(5)(B) are not limited to the "noncommercial torts" exception of that "paragraph," but extend to restore sovereign immunity for any such tort claims, even if committed in the course of a "commercial activity" as defined in section 1605(a)(2). Thus, even though INMECAFE's acts that form the basis of the Export Group's complaint were "commercial activities" under section 1605(a)(2), the court ruled that they were entitled to sovereign immunity under section 1605(a)(5)(B).

B. *Is INMECAFE an Agency of the Mexican Government?*

Export Group argues on appeal that INMECAFE is not an "agency or instrumentality" of the Mexican government and therefore cannot avail itself of sovereign immunity under 28 U.S.C. § 1603(b). This is a novel position for the Export Group to take on appeal, since it repeatedly and consistently argued below that INMECAFE was "an agency or representative of the Mexican Government."

INMECAFE bears the burden of proof to establish its entitlement to sovereign immunity under the FSIA before the burden shifts to the plaintiff to establish an exception. *Meadows v. Dominican Republic*, 817 F.2d 517, 522-23 (9th Cir.), *cert. denied*, 484 U.S. 976, 98 L. Ed. 2d 485, 108 S. Ct. 486 (1987). INMECAFE met its burden in the district court by submitting official Mexican government documents and a sworn affidavit of INMECAFE's counsel that establish INMECAFE's authority under Mexican law to act as "a dependency of the [Mexican] Ministry of Agriculture and Cattle . . . ." Moreover, the Export Group's pleadings below conceded this fact. *See American Commercial Barge Lines, Co., v. N.L.R.B.*, 758 F.2d 1109, 1114 n.2 (6th Cir. 1985) (stating that one party's burden of proof may be satisfied by admissions in the other party's pleadings).

The Export Group argues that it may contest this issue on appeal because this court has recognized that plaintiffs are not limited to the statutory basis for subject matter jurisdiction stated in their complaint. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1515 (9th Cir. 1987). Appellants misconstrue *Gerritsen*, which explicitly limits plaintiffs to the facts alleged in their complaint, but allows those facts to establish subject matter jurisdiction on some other statutory basis. *Id.* Here, however, the Export Group attempts to plead facts different from those in their complaint, without explanation for their failure to discover these facts earlier. *See International Union of Bricklayers & Allied Craftsman v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (stating that before this court will address such an issue "the proponent must show exceptional circumstances why the issue was not raised below") (quotations and citations omitted). Accordingly, we refuse to consider the Export Group's newly asserted facts. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990)

(stating that facts and documents not presented to the district court are not part of the record on appeal); *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978); *see also Gregorian v. Izvestia*, 871 F.2d 1515, 1528 (9th Cir.) (refusing to resolve factual dispute as to jurisdiction as a result of "facts" urged by plaintiff that were not pleaded in the plaintiff's complaint), *cert. denied*, 493 U.S. 891, 107 L. Ed. 2d 188, 110 S. Ct. 237 (1989).

C. *The District Court's Interpretation of the FSIA*

We must determine whether the district court erred in ruling that the exceptions to the waiver of sovereign immunity for "noncommercial torts" listed in section 1605(a)(5)(B) of the FSIA restrict the scope of the waiver of sovereign immunity for commercial activities established by section 1605(a)(2). Before addressing the merits of this issue, however, we must decide whether we are bound by a prior Ninth Circuit opinion upon which the district court relied in granting INMECAFE's Rule 60(b)(4) motion.

In a footnote in *Gregorian*, 871 F.2d at 1515, this court stated that "it is . . . likely that Congress meant the clauses retaining immunity in section 1605(a)(5)(B) to deny jurisdiction over any claims alleging the torts listed." *Gregorian*, 871 F.2d at 1522 n.4. INMECAFE relies upon this sentence, which suggests that all tort claims included in section 1605(a)(5)(B) are granted immunity whether committed by the foreign entity acting in a commercial or noncommercial capacity, as a holding of this court to which this panel is bound. *Cf. Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir.), *cert. denied*, 129 L. Ed. 2d 832, 114 S. Ct. 2704 (1994); *United States v. Gay*, 967 F.2d 322, 327 (9th Cir.), *cert. denied*, 121 L. Ed. 2d 272, 113 S. Ct. 359 (1992).

INMECAFE argues that the discussion in the *Gregorian* footnote constitutes an alternative ground for the court's decision. "Where a decision rest on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 93 L. Ed. 1524, 69 S. Ct. 1235 (1949) (quoted in *English v. United States*, 42 F.3d 473, 485 (9th Cir. 1994)); *Russell v. Commissioner of Internal Revenue*, 678 F.2d 782, 785 n.2 (9th Cir. 1982). Although the district court in *Carnival Cruise Lines, Inc. v. Oy Wartsila AB*, 159 Bankr. 984, 1001 (S.D. Fla. 1993) found that the footnote in Gregorian was "an alternate and supporting ground for the holding . . . and cannot be fairly cast as dicta,"[3] we conclude that the footnote is dictum.[4] *See Black's Law Dictionary*, 454 (6th ed. 1990) (defining "dictum" as "an observation or remark . . . not necessarily involved in the case or essential to its determination").

Gregorian held that there was no applicable exception to sovereign immunity under the FSIA

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[3] Despite its characterization of the precedential weight of the footnote in Gregorian, the district court in Carnival Cruise Lines expressly rejected the substance of that footnote. See 159 Bankr. at 1002 (stating that "[if the challenged activity is] commercial, there is no immunity. . . . Only if the activity is non-commercial need the plaintiff read further and beware that a foreign government may not be brought into an American Court for [the torts listed in section 1605(a)(5)(B)]").

[4] We acknowledge that it is often difficult to determine whether statements in a court's opinion constitute an alternative ground for the decision or merely dicta. Compare Operating Engineers Pension Trust v. Charles Minor Equipment Rental, Inc., 766 F.2d 1301, 1304 (9th Cir. 1985) (finding a previous court's statements provided an alternative ground for decision and thus were binding precedent), amended, 778 F.2d 538 (9th Cir. 1985), with id. at 1305-07 (Fletcher, J., dissenting) (finding the same language to be dicta).

for Gregorian's libel claim because Izvestia's activities were not commercial activities as defined by section 1605(a)(2). *See Gregorian*, 871 F.2d at 1521 ("The *nature* of the Izvestia article . . . is clearly governmental."); *id.* at 1522 ("In conclusion, then, we hold that the activity . . . was governmental rather than commercial in nature for purposes of section 1605(a)(2) of the FSIA"). The footnote suggests that Gregorian's "trade libel" claim would fare no better because, given the court's holding that Izvestia's actions were not "commercial activities" as defined in section 1605(a)(2), the alleged tort of trade libel would be encompassed within the libel exception of section 1605(a)(5)(B). *Id.* at 1522 n.4 (stating that the plaintiffs did "not seek an exception to immunity under section 1605(a)(5). Nor could plaintiffs have established subject matter jurisdiction for their [trade] libel claim under section 1605(a)(5)"). The statement in the footnote, that "it is far more likely" that Congress intended section 1605(a)(5)(B) to apply to all claims of libel, is therefore dictum, as it is offered only to explain why section 1605(a)(5)(B) would encompass the "trade libel" claim *if* plaintiffs had attempted to rely upon that section to establish jurisdiction. *See Black's Law Dictionary*, 454 (6th ed. 1990) (defining "dicta" as "expressions in the court's opinion which go beyond the facts before the court"). Although there are statements in the footnote that suggest the interpretation of section 1605 that INMECAFE urges,[5] these statements were not

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[5] The entire footnote reads as follows:
FN4. Plaintiffs' "trade libel" argument was designed to establish jurisdiction under section 1605(a)(2); the trade libel argument does not seek an exception to immunity under section 1605(a)(5). Nor could plaintiffs have established subject matter jurisdiction for their libel claim under section 1605(a)(5). This is because, contrary to plaintiffs' contention, the bar against "libel" claims contained in section 1605(a)(5)(B) must

necessary to the decision and thus have no binding or precedential impact in the present case. *See Wainwright v. Witt*, 469 U.S. 412, 422, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985); *Operating Engineers Pension Trust*, 766 F.2d at 1307 (Fletcher, J. dissenting); *see also United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988) (explaining the reasons for rejecting a prior court's dictum).

This reading of *Gregorian* is buttressed by the fact that no case in this circuit has cited the contested footnote as binding precedent, and, in fact, subsequent cases have contradicted its interpretation of section 1605. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992) (holding that the plaintiffs' claims for fraud and interference with business relationships are not subject to immunity because they "fall squarely within clause two of the commercial activity exception"), *cert. denied*, 113 S. Ct. 1812 (1993); *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1446 & n.1 (9th Cir. 1991) (finding subject matter jurisdiction under the commercial activity

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be construed to include claims of "trade libel." As *amicus curiae* United States correctly points out, a contrary interpretation would yield nonsensical results. Statement of Interest of the United States, at 15. For example, foreign sovereign immunity is expressly retained in section 1605(a)(5)(B) for claims of "interference with contract rights" as well as for libel claims. As the United States observes, contract rights cases will almost always involve commercial activity, and it would have been odd for Congress, without saying so clearly, to have retained immunity for such claims only in the unusual situation in which entirely non-commercial activity was involved. *Id.* at 15-16. We agree that it is far more likely that Congress meant the clauses retaining immunity in section 1605(a)(5)(B) to deny jurisdiction over any claims alleging the torts listed.
871 F.2d at 1522 n.4.

exception over fraud claim), *cert. denied*, 121 L. Ed. 2d 219, 113 S. Ct. 295 (1992). If *Gregorian*'s footnote were binding precedent, subsequent panels of this court would not have been able to find subject matter jurisdiction under the commercial activity exception over tort claims exempted in section 1650(a)(5)(B). *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990) (stating that "federal courts are under an independent obligation to examine their own jurisdiction"); *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994); *see also Operating Engineers Pension Trust*, 766 F.2d at 1307 (Fletcher, J. dissenting) (arguing that the fact that subsequent case law does not cite or follow contested statements supports finding that those statements are dicta). Thus, we are not bound by the dictum contained in *Gregorian*'s footnote. *See Webb v. Lewis*, 44 F.3d 1387, 1392 (9th Cir. 1994) (refusing to be bound by previous panel's dictum), *cert.denied*, 115 S.Ct. 2002, 131 L.Ed.2d 1003 (1995); *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 425 n. 43 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

D. *Interpreting the FSIA*

(1) *The Statute's Plain Meaning*

We are not the first court to acknowledge the confusing nature of the language and structure of 28 U.S.C. § 1605. *See Saudi Arabia v. Nelson*, 123 L. Ed. 2d 47, 113 S. Ct. 1471, 1478 (1993) (criticizing the Act's inadequate definition of "commercial activity"); *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (describing "direct effect" clause as "hopelessly ambiguous"), *cert. denied*, 130 L. Ed. 2d 787, 115 S. Ct. 904 (1995); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985); *Gregorian*, 658 F. Supp. 1224 at 1235.

"Fully aware of this statutory complexity, we still have no choice but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Metropolitan Life Ins. Co., v. Massachusetts*, 471 U.S. 724, 740, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985) (quoting *Park'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985)); *Straub v. A P Green, Inc.*, 38 F.3d 448, 452 (9th Cir. 1994).

The clear statutory language of section 1605(a)(5) indicates that both this exception and the restrictions upon this exception are intended to apply only to torts "not otherwise encompassed in [section 1605(a)(2)]." *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987), (stating that "the tortious activity exception provides jurisdiction over tort actions not encompassed in the commercial activity exception"), *cert. denied*, 485 U.S. 905, 99 L. Ed. 2d 236, 108 S. Ct. 1077 (1988); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983), *cert. denied*, 469 U.S. 880, 83 L. Ed. 2d 182, 105 S. Ct. 243 (1984); *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 441, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989) (referring to section 1605(a)(5) as the "noncommercial torts exception"); *Siderman de Blake*, 965 F.2d at 714 (same); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 780, 782 (9th Cir. 1991) (same); *see also* H. R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6619 [hereineafter "House Report" with citations to U.S.C.C.A.N.] (classifying section 1605(a)(5) as "Noncommercial torts"). Similarly, the phrase that establishes the two sets of restrictions on the waiver of sovereign immunity established by section 1650(a)(5) (subsection (A) for discretionary functions and subsection (B) for enumerated torts) states

that in those cases "*this paragraph* shall not apply." Thus, by its plain and unambiguous terms, section 1605(a)(5) limits the reach of those restrictions only to noncommercial torts.

Established canons of statutory construction state that "generally an exception is considered a limitation only upon the matter which directly precedes it"[6] and "exceptions are not to be implied. An exception cannot be created by construction." Norman J. Singer, 2A Sutherland Stat. Const. § 47.11 (5th ed. 1992). In addition, there is a presumption that Congress would not enumerate specific exemptions in section 1605(a)(5) but leave the exemptions in another section of the same statute to judicial identification. Henry C. Black, Handbook of the Construction and Interpretation of the Laws §§ 27, 32 (2d ed. West 1911); Sutherland, *supra* § 47.23 ("The force of the maxim ['expressio unius est exclusio alterius'] is strengthened where a thing is provided in one part of a statute and omitted in another.").

The district court in *Gregorian* looked to the Federal Torts Claims Act ("FTCA") to inform its interpretation that § 1605(a)(5)(B) applies to commercial activities.[7] Consistent application of that court's logic would require that clause section 1605(a)(5)(A), which restores sovereign immunity for "discretionary functions" of foreign state actors, would also apply beyond the clearly expressed limits of that subsection to a foreign state's commercial activities, since that clause is on an equal structural footing with section 1605(a)(5)(B). Thus, any commercial activity in which the

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[6] However, "if a contrary intent or meaning is *clearly indicated* [an exception] will operate as a general limitation on all provisions of the act." Norman J. Singer, 2A Sutherland Stat. Const. § 47.11 (5th Ed. 1992).

[7] See *infra* Section (4).

foreign state actor engaged in a "discretionary function" would also be immune,[8] effectively rendering section 1605(a)(2) a hollow shell. *See Colautti v. Franklin*, 439 U.S. 379, 392, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979) (stating that "[it is an] elementary cannon of construction that a statute should not be interpreted so as to render one part inoperative."), *overruled in part on other grounds, Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989). Thus, there is no compelling reason to construe the FSIA in a way that departs from the Act's plain language. *See* Sutherland, *supra*, § 47.11 (Supp. 1995) (stating that only "where the construction of a statute would lead to a manifest contradiction of the apparent purpose of the statute, it is to be presumed that some exception or qualification was intended by the legislature").

(2) *Other Court's Interpretations of the Statute*

To date, the district court in Gregorian is the only court to rule that foreign states and their agents are immune from claims for torts listed in section 1605(a)(5)(B) when those claims arise from the foreign actor's commercial activities. *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1234-35 (C.D. Cal. 1987), *aff'd in part, rev'd in part*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

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[8] In fact, this is precisely the scope of immunity that the United States Government enjoys under the Federal Torts Claims Act ("FTCA"). See 28 U.S.C. § 2680(a) & (h) (1988). That Congress could not have intended this section to apply to commercial activities of foreign states indicates the error in the *Gregorian* district court's logic of limiting foreign states' commercial activities to the same jurisdictional limitations the United States enjoys under the FTCA. *See infra* Section (4).

Neither the Supreme Court nor any circuit court has explicitly decided whether the exceptions listed in section 1605(a)(5)(B) restrict the "commercial activity" exceptions of section 1605(a)(2). *But see Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (construing statutory language of two clauses and finding that "this language suggests that the commercial activity exception to jurisdictional immunity under (2) and the tort exception under (5) are mutually exclusive"), *cert. denied*, 471 U.S. 1125, 86 L. Ed. 2d 273, 105 S. Ct. 2656 (1985); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 n. 27 (D.C. Cir. 1982) (stating as dictum that the exceptions in section 1605(a)(5)(B) do not limit section 1605(a)(2)). Every other court that has addressed this issue has construed the two clauses as mutually exclusive. *See Carnival Cruise Lines*, 159 Bankr. at 1002; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 759 F. Supp. 855, 859 (D.D.C. 1991) (stating that "the clear language of the statute declares that section 1605(a)(5) does not apply to section 1605(a)(2)"); *Le Donne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1410-11 (E.D. Va. 1988) (expressly disagreeing with the district court's opinion in *Gregorian* and holding that "subsection (a)(5)(B) . . . operates only where . . . the foreign state's acts are governmental, not commercial"); *Tifa, Ltd. v. Republic of Ghana*, 692 F. Supp. 393, 404 (D.N.J. 1988) ("Section 1605(a)(5) does not apply to cases . . . which involve commercial activity encompassed in section 1605(a)(2)."); *United Euram Corp. v. U.S.S.R.*, 461 F. Supp. 609, 612 (S.D.N.Y. 1978) (same); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 855 (S.D.N.Y. 1978) (same).

Moreover, several courts, including this one, have addressed claims alleging the torts listed in section 1605(a)(5)(B) exclusively under the commercial activity exception, without mentioning the potential applicability of the noncommercial torts exemption. *See,*

e.g., *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n*, 33 F.3d 1232 (10th Cir. 1994) (fraud and misrepresentation), *cert. denied*, 130 L. Ed. 2d 787, 115 S. Ct. 904 (1995); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993) (fraud and misrepresentation); *Siderman de Blake*, 965 F.2d at 710 (fraud and interference with business relationships); *Richmark Corp.*, 937 F.2d at 1446 & n.1 (fraud); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 447 (6th Cir. 1988) (unfair competition, misappropriation of trade secrets, and interference with contractual relationship); *Gilson*, 682 F.2d at 1022 (dismissing claims for deceit and interference with contractual rights on statute of limitations grounds); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101 (S.D.N.Y. 1993) (fraud and negligent misrepresentation); *AMPAC Group Inc. v. Republic of Honduras*, 797 F. Supp. 973 (S.D. Fla. 1992) (finding jurisdiction under section 1605(a)(2) for claims of fraud and misrepresentation); *L'Europeene De Banque v. La Republica De Venezuela*, 700 F. Supp. 114 (S.D.N.Y. 1988) (finding jurisdiction under section 1605(a)(2) for fraud claim); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1115 & n. 11 (S.D.N.Y. 1982) (finding jurisdiction under section 1605(a)(2) for claims of fraud and interference with contractual relations). Thus, other courts have not found that section 1605(a)(5)(B) provides across-the-board immunity from these types of torts.

(3) *Legislative History*[9]

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[9] Ordinarily, "resort to legislative history is not necessary when the language of the statute is unambiguous." *Straub v. A P Green, Inc.*, 38 F.3d 448, 454 (9th Cir. 1994) (citing *Brooker v. Desert Hospital Corp.*, 947 F.2d 412, 414 (9th Cir. 1991)). Here, although INMECAFE's proposed interpretation of the statute contradicts its plain language, it is nevertheless a plausible one. Therefore, "we consult

Reference to the statute's "Findings and Declaration of Purpose" makes clear what Congress intended: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . ." 28 U.S.C. § 1602 (1988). Legislative history indicates that Congress intended to adopt

> the so-called restrictive theory of sovereign immunity; that is the sovereignty of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform.

House Report, supra, at 6613; *see also Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1479, 123 L. Ed. 2d 47 (1993) (citing legislative history to justify the rule that there is no immunity when the foreign state "acts in the manner of a private player within the market") (internal quotations and citations omitted); *id.* at 1482-83 n.2 (Kennedy, J., concurring in part and dissenting in part) (quoting legislative history, and stating that "the purpose of the commercial exception [is] to prevent foreign states from taking refuge behind their sovereignty when they act as market participants"); *id.* at 1489 (Stephens, J., dissenting) (stating that "when a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace"); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160, 2165-66, 119 L. Ed. 2d 394 (1992); *Amerada Hess*

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the legislative history, to the extent it is of value, to aid in our interpretation." *Straub*, 38 F.3d at 452.

Shipping, 488 U.S. at 434 n. 1; *Verlinden B.V.*, 461 U.S. at 488; *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 703-04, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1472 (9th Cir. 1994) (stating that the restrictive principle of sovereign immunity codified in the FSIA "limits the immunity of a foreign state to its inherently governmental or public acts but does not extend to suits based upon its commercial or private acts"), *cert. denied*, 115 S. Ct. 934 (1995); *Siderman de Blake*, 965 F.2d at 705-06; *accord Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994) ("If the sovereign's activity is commercial in nature . . . then the jurisdictional nexus is met, no immunity attaches, and a district court has the authority to adjudicate disputes based on that activity."). It is consistent with the broader legislative intent of Congress, which is to hold foreign states accountable in United States courts for all acts committed in their capacity as market participants, to interpret the plain language of section 1605(a)(2) as not restricted by other clauses that establish separate and alternative exceptions to sovereign immunity applicable to actions of foreign states performed in a noncommercial capacity.

There is an even more explicit indication that Congress intended the "commercial activity" exception to encompass even those non-personal-injury tort claims from which foreign states acting as sovereigns are immune under section 1605(a)(5)(B). In its "Section-by-Section Analysis" of the Act, the House Report clarifies the meaning of section 1603(e), which defines "commercial activity carried on in the United States by a foreign state," the first of the three categories of "commercial activities" that is excepted from sovereign immunity in § 1605(a)(2). House Report, supra, at 6615. Among other examples

listed, the report includes "import-export transactions involving sales to, or purchases from, concerns in the United States[;] *business torts* occurring in the United States (cf. § 1605 (a)(5))." *Id.* (emphasis added). Congress could not have provided a more explicit and unequivocal indication of its intent to have all commercial activities, including those torts enumerated in section 1605(a)(5)(B), be exempt from sovereign immunity.

(4) *The Comparison Made by the District Court in* Gregorian *to the FTCA is Inapposite*

The district court in *Gregorian* reasoned that since the exceptions of section 1605(a)(5)(B) mirrored the exceptions of the FTCA, House Report, *supra*, at 6620, it was "unlikely that Congress wished to create a double standard under which foreign sovereigns could be sued in United States courts on tort claims, such as libel, for which the United States Government is immune." *Gregorian*, 658 F. Supp. at 1234. While this may have been true specifically of section 1605(a)(5), the analogy does not apply to commercial activities of foreign states, an exception to the general grant of sovereign immunity afforded by the FSIA which has no counterpart in the FTCA. *See* Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 193 (1988) (analyzing the structural differences between the FTCA and the FSIA).

Congress did not intend the FSIA to subject foreign states - acting *either* in their private or public (sovereign) capacity - to the same liability that the United States government faces in the United States courts. Rather, Congress intended to subject foreign states to the same treatment in United States courts that the United States government receives in foreign courts. *See* House Report, *supra*, at 6605, 6607-08 (stating that the "restrictive" principle of sovereign immunity "is regularly

applied against the United States in suits against the U.S. Government in foreign courts"); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587 (9th Cir. 1983), *cert. denied*, 469 U.S. 880, 83 L. Ed. 2d 182, 105 S. Ct. 243 (1984).

Moreover, Congress expressly acknowledged that international law does not extend immunity to the acts of any state that are not governmental or "public acts (jure imperii)." House Report, *supra*, at 6605; *see* Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987) ("Under international law, a state or instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons") (cited in *Saudi Arabia v. Nelson*, 113 S. Ct. at 1479)); *see also Nelson*, 113 S. Ct. at 1486 (Kennedy, J., concurring in part and dissenting in part) (distinguishing between the language of the FTCA and the FSIA).

Lastly, the legislative history squarely rebuts INMECAFE's argument that section 1605(a)(5)(B) restores sovereign immunity for all non-bodily injury tort claims whether or not they arise in the course of commercial activity.[10] In discussing the meaning and intended scope of "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," which is the second of three clauses within section 1605(a)(2), the House Report includes "a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act

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[10] n10 "The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other *noncommercial* tort to maintain an action against the foreign state to the extent otherwise provided by law." House Report, *supra*, at 6620 (emphasis added).

in the United States that violates U.S. securities laws or regulations; [and] the wrongful termination in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country." House Report, *supra*, at 6617-18. These examples of "commercial activity" for which there is no sovereign immunity indicate Congress' intent that jurisdiction should not be limited to tort claims involving bodily injury, such as in traffic accidents.[11] Thus, the legislative history indicates that the commercial activity exception created in section 1605(a)(2) encompasses tortious activities for which immunity is retained in section 1605(a)(5)(B) for foreign states when acting in their noncommercial, sovereign capacity, as it is for the United States government under the FTCA.

CONCLUSION

For the reasons discussed above, we find that the district court erred in ruling that the exceptions to the "non-commercial torts" section of the FSIA, 28 U.S.C. § 1605(a)(5)(B), restore sovereign immunity to a foreign state's "commercial activities" under 28 U.S.C. § 1605(a)(2). Accordingly, we reverse the district court's order setting aside the default judgment on the ground that the court lacked subject matter jurisdiction over the Export Group's claim for interference with

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[11] These examples also indicates quite clearly that Congress did not intend the commercial activity exception to be limited only to claims for breach of contract. Indeed, U.S. securities laws and regulations provide for private causes of action based upon claims of fraud and misrepresentation. *See, e.g.*, 15 U.S.C. §§ 77k, 77l, 77q, 78j, 78r, 78z; Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5.

contract rights, and remand for further proceedings.[12]

REVERSED and REMANDED.

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[12] On remand, the district court should consider INMECAFE's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(3), upon which the district court expressly reserved ruling. We express no opinion on the merits of this claim.

F I L E D
APR 19 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE EXPORT GROUP, Plaintiff, v. REEF INDUSTRIES, INC., et. al., Defendants.	CV-83-05338 TJH (Kx) **ORDER AND JUDGMENT**

The Court, has considered Defendant Mexican Coffee Institute's motion for judgment on the pleadings, together with the moving and opposing papers.

IT IS ORDERED that the motion be, and hereby is, GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall take nothing and each party shall bear its own costs.

Date: April 18, 1996

Terry J. Hatter, Jr./signature
TERRY J. HATTER, JR.
UNITED STATES DISTRICT JUDGE